RECORD AND BRIEFS

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No. 17-515

In the Supreme Court of the United States

CNH INDUSTRIAL N.V. & CNH INDUSTRIAL AMERICA, LLC,

Petitioners,

v.

JACK REESE; FRANCES ELAINE PIPPE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* FOR WHIRLPOOL CORPORATION IN SUPPORT OF PETITIONERS

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MOTION OF WHIRLPOOL CORPORATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Amicus Whirlpool Corporation respectfully moves pursuant to Rule 37.2 of the Rules of this Court for leave to file a brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief, and their consent is on file with the Clerk. Respondent does not consent to this filing.

Whirlpool Corporation is a leading global manufacturer of home appliances, employing more than 20,000 people in the United States. Whirlpool has substantial operations in the Sixth Circuit, including its headquarters in Michigan and large manufacturing operations in Ohio and Tennessee, as well as in other circuits. Whirlpool therefore has a powerful interest in the Sixth Circuit following this Court's precedents regarding the vesting of retiree healthcare benefits, see *M&G Polymers USA* v. *Tackett*, 135 S.Ct. 926 (2015), and in resolving the circuit split that has resulted from the Sixth Circuit's failure to do so. Further confusing the legal rules applicable to corporations like Whirlpool that do business in the Sixth Circuit, that court of appeals has developed competing and irreconcilable lines of authority addressing the vesting of retiree healthcare benefits, which the court has been unable to resolve en banc.

The question presented in the petition is of immediate and concrete importance to Whirlpool. Whirlpool is a defendant in protracted and costly retiree healthcare benefits litigation in the Northern District of Ohio. That case has been litigated in the district court for six years, culminating in a decision vesting retiree healthcare benefits that would not have been held vested in any other circuit in the Nation. See *Zino* v. *Whirlpool Corp.*, No. 11-CV-1676, 2017 WL 3219830 (N.D. Ohio July 27, 2017). Whirlpool has

appealed that erroneous decision. Nos. 17-3851/3860 (6th Cir.).

Whirlpool also possesses a practical understanding of the effect of the Sixth Circuit's vesting rule as compared to the contrary rule applied in other circuits. Whirlpool has litigated the same healthcare-vesting question in the Eighth Circuit, which—unlike the Sixth Circuit—is in step with this Court's precedent. See *Maytag Corp.* v. *UAW*, 687 F.3d 1076 (8th Cir. 2012). Whirlpool understands the realities of these competing rules and has a strong interest in advocating a uniform nationwide standard that conforms with this Court's *Tackett* decision.

For these reasons, Whirlpool believes that its perspective on the importance of the issues raised by the petition will assist the Court in its consideration of this case.

Respectfully submitted.

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INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus* is set forth in the foregoing motion for leave to file this *amicus* brief.[1]

STATEMENT

The petition asks the Court to resolve an entrenched split in authority over the proper legal rule for interpreting healthcare benefit provisions in collective bargaining agreements ("CBAs"). This case provides an appropriate vehicle for resolving the matter, for the CBA between petitioners (collectively "CNH") and the union that represented respondent retirees is similar in many respects to contracts in effect throughout the country. The question presented is whether these ubiquitous types of contract terms require employers to pay healthcare benefits for the life of every retiree, even after the contract expires.

CNH entered into the CBA at issue with the United Automobile, Aerospace, and Agricultural Workers of America in 1998. *Reese* v. *CNH Indus. N.V.*, 854 F.3d 877, 879 (6th Cir. 2017) ("*Reese III*"). As is common, that CBA offers healthcare benefits for retirees and spouses entitled to receive a pension: "Employees who retire under that * * * Pension Plan * * * after 7/1/94, or their surviving spouses eligible to receive a spouse's pension under the provisions of the Plan, shall be eligible for the Group benefits as described in the following paragraphs." *Ibid.* By its terms, the CBA expired on May 2, 2004. Pet. App. 115.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission.

Respondents are former employees who retired between 1994 and 2004 and their spouses. *Reese III*, 854 F.3d at 879. They filed suit against CNH in the U.S. District Court for the Eastern District of Michigan in 2004, claiming an entitlement to lifetime healthcare benefits under the 1998 CBA. *Ibid.* Thirteen years of litigation have followed, including three appeals to the Sixth Circuit, whose third opinion (*Reese III*) is the subject of petitioners' request for certiorari review.

The panel majority in *Reese III* recognized that, since its prior decision in *Reese II*, this Court decided *Tackett*. *Tackett* overturned longstanding Sixth Circuit case law—beginning with *UAW* v. *Yard-Man, Inc.*, 716 F.2d 1476 (1983)—which had adopted unfounded inferences that retiree healthcare benefits vested for life. Nonetheless, relying heavily on the four-Justice concurrence in *Tackett* (rather than the five-Justice majority), the court in *Reese III* held that the 1998 CBA was ambiguous and that extrinsic evidence suggested an intent to confer benefits on CNH employees for life. 854 F.3d at 883. Essentially, the court revived *Yard-Man* as an inference of contractual ambiguity, instead of a direct inference of vesting, replacing one heavy thumb on the scale with another.

Judge Sutton dissented. He explained that the vesting rules laid out in *Tackett* "should make quick work of this case." 854 F.3d at 888. The durational clause in the CBA—providing that the contract would expire in 2004—set an end date for "all of the benefits and burdens of the contract (not otherwise extended or shortened)." *Ibid.* The CBA offered no alternative expiration rule for retiree healthcare benefits, so the durational clause controlled. *Ibid.*

The Sixth Circuit denied petitioners' request for en banc review. Judge Sutton would have granted panel rehearing.

ARGUMENT

I. The Ruling Below Conflicts Squarely With This Court's Decision In *Tackett*.

1. In *Tackett*, this Court overruled the Sixth Circuit's *Yard-Man* rule, which "violate[d] ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all [CBAs]." 135 S.Ct. at 935. The Sixth Circuit had "refused to apply general durational clauses to provisions governing retiree benefits" and instead "require[d] a contract to include a specific durational clause for retiree healthcare benefits to *prevent* vesting." *Id.* at 936 (emphasis added). This approach "distort[ed] the text of the agreement" and defied "the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties." *Ibid.*

Yard-Man was also wrong in holding that health-care benefits vest when a CBA includes termination dates for some benefits but "no provision specifically address[ing] the duration of retiree healthcare benefits." 135 S.Ct. at 934. And it was error to infer vesting from a CBA "provision that ties eligibility for retirement-health benefits to eligibility for a pension." *Id.* at 935 (internal quotation marks omitted).

In place of these mistaken inferences, *Tackett* stressed "the traditional principle that courts should not construe ambiguous writings to create lifetime promises." *Id.* at 936 (citing 3 A. Corbin, CORBIN ON CONTRACTS §553, at 216 (1960)). In this regard, *Tackett* explained (135 S.Ct. at 937, emphasis added), *Yard-Man* erred in departing from the Sixth Circuit's own approach to "*noncollectively* bargained contracts

offering retiree benefits" in *Sprague* v. *General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (en banc). *Sprague* rightly applied "ordinary principles of contract law" to conclude that "'an employer's commitment to vest such benefits is not to be inferred lightly'" and therefore "'must be found in the plan documents and must be stated in clear and express language.'" *Tackett*, 135 S.Ct. at 937. This requirement both tracks black letter contract principles and adheres to the labor-law rule that courts may "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless" the waiver is "explicitly stated" and "clear and unmistakable." *Metro. Edison Co.* v. *NLRB*, 460 U.S. 693, 708 (2003).

Tackett embraced the related "principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" 135 S.Ct. at 937. That principle means that "'a collective-bargaining agreement [may] provid[e] in explicit terms that certain benefits continue after the agreement's expiration.'" *Ibid.* "'But when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life.'" *Ibid.*

2. The Sixth Circuit's ruling in *Reese III* conflicts squarely with *Tackett*. CNH's CBA included a general durational clause terminating the agreement in 2004. Yet the majority cited the contract's supposed "silence as to the parties' intentions" regarding the duration of retiree healthcare as a source of ambiguity. 854 F.3d at 882. Likewise, the majority found ambiguity in the fact that entitlement to retiree healthcare is tied to pension eligibility. *Ibid.* These are inferences that *Tackett* expressly prohibits. See 135 S.Ct. at 936-937.

Nor is there anything to *Reese III*'s theory that although silence and tying are off limits as grounds to infer a right to lifetime benefits, these same factors serve as sources of ambiguity. *Tackett* requires clear and explicit vesting language, not ambiguity. As Judge Sutton observed in dissent, "[a] forbidden inference cannot generate a plausible reading" of the CBA. 854 F.3d at 891.

The panel's method of manufacturing ambiguity is flatly inconsistent with *Tackett*. See *supra* p. 4; 135 S.Ct. at 935, 937. The tying language "has nothing to do with the duration of the healthcare benefits." *Reese III*, 854 F.3d at 891 (Sutton, J., dissenting). "The agreement says that pensioners 'shall be eligible' for healthcare benefits *for as long as the agreement provides those benefits*—that is, until May 2, 2004—not for as long as retirees earn a pension." *Ibid.*

The panel also relied on the fact that "healthcare coverage continues past the date of retirement," unlike other CBA provisions. 854 F.3d at 882. But that is equally irrelevant. As Judge Sutton explained, this language merely preserves the benefit after an employee retires. "It does not say that benefits continue past the termination date of the agreement, much less that they continue for life." *Id.* at 890. The contract in *Yard-Man* included similar provisions, but *Tackett* specifically rejected *Yard-Man*'s inference of vested benefits based on this language. 135 S.Ct. at 934.

In short, *Reese III* held that commonplace provisions in the 1998 CBA—provisions that *Tackett* considered and rejected as evidence of vesting—rendered the CBA ambiguous. In further violation of *Tackett*, the panel then found an intent to confer lifetime benefits based on that supposed ambiguity.

3. The majority in *Reese III* derives much of its understanding of this Court's decision in *Tackett* from the Sixth Circuit's opinion on remand in that case. See 854 F.3d at 881-883. But the decision on remand "rel[ied] heavily" not on the five-Justice majority in *Tackett*, but on the four-Justice concurrence. *Id.* at 882. *Reese III* relies on the concurrence's views that "[n]o rule requires 'clear and express' language in order to show that parties intended healthcare benefits to vest," and that employer obligations may be found in "implied terms of the expired agreement." *Id.* at 881. And it relied on the concurrence in assigning little weight to the CBA's general durational cause and in using extrinsic evidence to infer a right to vested healthcare benefits. *Id.* at 881-882.

It is impossible to reconcile those principles with the Court's opinion in *Tackett*. This Court made explicit that "clear and express language" *is required* to vest benefits for life in the face of a contract's general durational clause. See 135 S.Ct. at 937 ("'an employer's commitment to vest such benefits is not to be inferred lightly'" and "'must be stated in clear and express language'"); *ibid.* (enforcing "the traditional principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement'"); *ibid.* ("'when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life'").

As the dissent below explained, the opinion for the Court in *Tackett* "should make quick work of this case." 854 F.3d at 888. Petitioners "never promised to provide healthcare benefits for life" in the 1998 CBA, "and the agreement contained a durational clause that limited *all* of the benefits and burdens of the contract (not otherwise extended or shortened) to the six-year term of the agreement." *Ibid.* Under *Tackett*, that "would

end this case. The durational clause would control, and the healthcare benefits would last as long as the durational clause said they would." *Ibid.*; see also *id.* at 889 (Sutton, J., dissenting).

Conflicting statements in the *Tackett* concurrence are not controlling. See *Maryland* v. *Wilson*, 519 U.S. 408, 412-413 (1997). The reasoning in a concurrence does not become part of the Court's holding, even if the majority opinion "does not expressly preclude ([and] is 'consistent with') the concurrence's approach." *Alexander* v. *Sandoval*, 532 U.S. 275, 285 n.5 (2001).

4. The CBA in *Reese* even more obviously forecloses the vesting of lifetime healthcare benefits than the contract in *Tackett*. CNH's summary plan document for the 1998-2004 period repeatedly informed all employees that CNH could amend or terminate the benefit plan. See Dist. Ct. Doc. 125-19. It provided, in boldface type, that "[a]n amendment or termination of the *** benefit plans may affect not only the coverages of active employees *** but also of *** former employees who retired, died, or otherwise terminated employment." *Id.* at 3; see *id.* at 5 (same). This warning expressly reserved CNH's rights to change or terminate retiree benefits.

Furthermore, prior to the 1998 contract, CNH and its predecessor repeatedly had renegotiated contracts with the UAW, and each new agreement included language conferring revised healthcare benefits on past retirees. *Reese III*, 854 F.3d at 879. The fact that "benefits were reset" in each contract "undermines a theory of vesting because it indicates that they would have to be reset again when this agreement expired." *Id.* at 892 (Sutton, J., dissenting). There would be no need to include a retiree-benefits right in each new

contract if prior contracts already created lifetime entitlements.

* * *

In sum, it is impossible to square the Sixth Circuit's decision in *Reese III* with this Court's holding in *Tackett*. Relying on statements from the *Tackett* concurrence that the Court did not embrace, the panel refused to follow the Court's holding that, without clear language to the contrary, a general durational clause establishes the termination date for an employer's retiree healthcare benefit obligations.

II. The Circuits Are Split Over The Question Presented And The Sixth Circuit Is Internally Divided.

In addition to contradicting this Court's decision in *Tackett*, *Reese III* "abrad[ed] an inter-circuit split (and an intra-circuit split) that the Supreme Court just sutured shut." 854 F.3d at 890 (Sutton, J., dissenting). Each of these splits warrants this Court's review.

A. There Is An Entrenched And Mature Split Among The Federal Courts Of Appeals.

Petitioner's CBA includes a general durational clause and nowhere expressly grants retirees the right to healthcare benefits for life. "In every other circuit in the country, that would end this case. The durational clause would control, and the healthcare benefits would last as long as the durational clause said they would." 854 F.3d at 888 (Sutton, J., concurring); see *id.* at 889 (same). In short, "every other court in the country would handle this case differently." *Id.* at 893. A catalog of decisions from the First, Second, Third, Fifth, Seventh, and Eighth Circuits proves the point. *Id.* at 889, 893; see also *Nichols* v. *Alcatel USA, Inc.*, 532 F.3d 364, 376-378 (5th Cir. 2008). Consider the

following cases, each of which would have come out differently under the rule applied in *Reese III*.

1. In *Senn* v. *United Dominion Industries, Inc.*, 951 F.2d 806, 807-811 (7th Cir. 1992), retirees claimed a right to lifetime healthcare benefits under a series of five CBAs. Plan documents accompanying the later agreements included reservation-of-rights provisions and language expressly limiting health benefits to the term of the CBA. *Id.* at 809-810. But the early agreements merely stated that the employer "will continue" providing benefits "for retired employees," without saying anything about when those benefits expired. *Id.* at 808-809. The district court found ambiguity in all of the CBAs and proceeded to a jury trial over the meaning of extrinsic evidence. *Id.* at 811-812.

The Seventh Circuit reversed. In stark contrast to the approach in *Reese III*, the Seventh Circuit "recognized the legal proposition that, in the absence of an agreement to the contrary, a company is not obligated to continue retiree welfare benefits after the expiration of the contract." 951 F.2d at 814. Even in the early CBAs, the reference to ongoing coverage for retirees was insufficient to vest lifetime rights: "[t]he contract documents contained no language that established a vested right for persons who were retired during the term of the agreement to enjoy welfare benefits after the termination of the [CBA]." *Id.* at 815. And without an express exception for retiree benefits, the contract's general expiration date controlled. *Ibid.* As the court summarized, "[t]he default rule in this Circuit is that 'entitlements established by collective bargaining agreements do not survive their expiration or modification.'" *Id.* at 816. "Thus, it requires more than a statement in a CBA that welfare benefits 'will continue' to create an ambiguity about vesting, for the

logical interpretation under our rule is that benefits 'will continue' for the duration of the contract." *Ibid.*

2. Likewise, in *UAW* v. *Skinner Engine Co.*, 188 F.3d 130, 134 (3d Cir. 1999), retirees sought lifetime medical benefits under several CBAs negotiated over nearly two decades. Each contract provided that these benefits "will continue" and "shall remain" in the future, without saying when if ever the employer's obligation to provide the benefits would end; each agreement merely included a general durational clause. *Id.* at 135-136, 141.

Like the Seventh Circuit in *Senn*, the Third Circuit held that lifetime benefits had not vested. The court recognized that, "[b]ecause vesting of welfare plan benefits constitutes an extra-ERISA commitment, an employer's commitment to vest such benefits is not to be inferred lightly and must be stated in clear and express language." 188 F.3d at 139. Without such unambiguous language, the Third Circuit concluded—in stark contrast to the Sixth Circuit here—it was "more reasonable" to view the CBAs' general durational clauses as controlling, and the employer's retiree-benefit obligations therefore ended when each CBA expired. *Id.* at 141-142. The Third Circuit went on to warn against the dangers of using "extrinsic evidence in interpreting collective bargaining agreements" (*id.* at 146) and reiterated that "[s]ilence on duration * * * may not be interpreted as an agreement by the company to vest retiree benefits in perpetuity." *Id.* at 147.

3. More recently, the Third Circuit followed *Tackett* and "adhere[d] to 'the traditional principle that contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" *Grove* v. *Johnson Controls, Inc.*, 2017 WL

2590762, at *3 (3d Cir. June 15, 2017) (unpublished op.). The Third Circuit therefore held that medical benefits that purportedly "continue[d]," without a set termination date, expired with the CBA. *Ibid.* The Fourth Circuit likewise rejected claims that retiree health benefits were guaranteed beyond the duration of the CBA. *Barton* v. *Constellium Rolled Prods.-Ravenswood, LLC*, 856 F.3d 348, 354 (4th Cir. 2017) (quoting *Tackett* rule that "'when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life'").

4. Whirlpool's experience litigating its obligations under Maytag CBAs shows that a reservation-of-rights provision like the one in the CNH summary plan description (*supra* p. 8) precludes vesting. The Eighth Circuit correctly held that "[w]hen the applicable [summary plan document], 'devoid of vesting language, explicitly reserves the right to modify the retiree medical benefit plan at any time,' beneficiaries 'have not met the burden of proving vesting language,' and extrinsic evidence *may not be considered.*" *Maytag Corp.* v. *UAW*, 687 F.3d 1076, 1086 (8th Cir. 2012).

5. The circuit split is lopsided, for the Sixth Circuit has struck out on its own. Nevertheless, ERISA's broad forum-selection provision allows unions and retirees to forum shop to take advantage of the Sixth Circuit's unique approach. Most courts, including those in the Sixth Circuit, read ERISA to permit retiree healthcare vesting suits in any federal district where any retiree resides. See 29 U.S.C. §1132(e)(2); *Varsic* v. *U.S. Dist. Ct. for the C. D. of Cal.*, 607 F.2d 245, 247 (9th Cir. 1979); *Oakley* v. *Remy Int'l, Inc.*, 2010 WL 503125, at *2-3 (M.D. Tenn. Feb. 5, 2010). For large (and many smaller) employers, it is easy for a plaintiff to pursue lifetime benefits in the Sixth Circuit.

This case illustrates the point. CNH sought declaratory relief in Wisconsin, where it is headquartered. But respondents filed this action in Michigan. See *Reese* v. *CNH America LLC*, 574 F.3d 315, 319 (6th Cir. 2009) (*Reese I*). Respondents won the forum dispute and secured the right to proceed in the Sixth Circuit. *Id.* at 320.

The plaintiffs in Whirlpool's case, *Maytag Corp.*, also sought to litigate in the Sixth Circuit. The union filed suit in the Western District of Michigan, where it likely would have remained had the employer not already filed a preemptive, declaratory judgment action in the Southern District of Iowa. *Maytag Corp.*, 687 F.3d at 1080-1081. So long as the Sixth Circuit maintains its divergent vesting rule, this forum shopping will continue.

6. Finally, the circuit split poses particular problems for national companies like Whirlpool, which face "a patchwork of different interpretations of a [single] plan" and therefore suffer from "considerable inefficiencies in benefit program operation." *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010). For these companies, inconsistent construction of the same plan poses monumental administrative burdens.

B. The Sixth Circuit Is Internally Divided, Without The Usual Remedy Of En Banc Review.

Reese III is not only at odds with established law in other circuits, but it also represents one side of an irreconcilable split within the Sixth Circuit itself. See *Inyo Cty.* v. *Paiute-Shoshone Indians*, 538 U.S. 701, 709 n.5 (2003) (certiorari granted to consider issue on which Ninth Circuit "expressed divergent views"); *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (observing that Court granted certiorari

"[b]ecause of this intracircuit conflict"). That the Sixth Circuit is deeply divided over the legal standard to apply in deciding whether retiree medical benefits have vested, and has been unable to resolve that division through en banc review, provides an additional reason for a grant of certiorari. See SUPREME COURT PRACTICE 255 (10th ed. 2013); *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 27 (1994) ("The value of additional intra-circuit debate seems to us far outweighed by the benefits that flow to litigants and the public from the resolution of legal questions").

1. By contrast to *Reese III*, two Sixth Circuit decisions have followed *Tackett*'s rule that a CBA's general durational clause controls unless the contract includes language granting a right to vested retiree benefits. In *Gallo* v. *Moen Inc.*, 813 F.3d 265, 267 (6th Cir. 2016), the court in an opinion by Judge Sutton rejected plaintiffs' claim to lifetime benefits, notwithstanding language in the CBAs guaranteeing "[c]ontinued" healthcare for retirees. As the court explained, "we should not expect to find lifetime commitments in time-limited agreements." *Id.* at 269. Accordingly, "[w]hen a specific provision of the CBA does not include an end date, we refer to the general durational clause to determine that provision's termination." *Ibid.* The three-year durational clause in *Gallo* meant the parties were "entitled to infer that any right to the benefit ends after three years." *Id.* at 274.

Judge Stranch dissented. Like the majority in *Reese III*, she would have found the contract ambiguous—despite the CBAs' general durational clause—and would have used extrinsic evidence to infer a right to lifetime benefits. *Id.* at 275.

Cole v. *Meritor, Inc.*, 855 F.3d 695 (6th Cir. 2017), issued the same day as *Reese III*, followed *Gallo*. Because the CBAs in *Cole* "included a general durational clause that terminated the agreement after three years" without any language "provid[ing] a specific expiration date for [healthcare] benefits," the employer's duty to furnish benefits ended after three years. *Id.* at 700. Judge White wrote separately to voice disagreement with the decision in *Gallo*, which she described as "install[ing] duration clauses as the new absolute determiner of intent." *Id.* at 702. Like the majority in *Reese III*, Judge White "would have found the CBA in [*Gallo*] ambiguous and its interpretation subject to parol evidence." *Ibid.* Unable to distinguish *Gallo* from *Cole*, however, she "reluctantly concur[red]." *Ibid.*

2. Also decided the same day as *Reese III* and *Cole* was *UAW* v. *Kelsey-Hayes Co.*, 854 F.3d 862 (6th Cir. 2017), another divided panel opinion. This time, however, the majority was in step with the majority in *Reese III* and in conflict with *Gallo* and *Cole*. As in *Gallo* and *Cole*, the CBA in *Kelsey-Hayes* included standard prospective language—"that health care 'shall be continued' without specifying for how long"—and a "general-durational clause." *Id.* at 868. As in *Reese III*, however, the majority in *Kelsey-Hayes* found the contract ambiguous. "Absent is explicit language that the benefits at issue vest for life," the court reasoned, "but also absent is a clear indication that they do not." *Id.* at 872. Accordingly, the *Kelsey-Hayes* majority sorted through a "mountain of extrinsic evidence" and (as in *Reese III*) used this evidence to infer that retirees were entitled to lifetime health benefits. *Id.* at 869-871.

Judge Gilman dissented. He would have followed "*Gallo*'s holding that we should not infer lifetime

benefits when, absent a specific carve-out, there is a general durational clause in the CBA." 854 F.3d at 875-876. As Judge Gilman explained, "*Gallo* applied ordinary contract principles to the CBA before it to conclude that the healthcare benefits were unambiguously not vested for life. Because the facts of this case are materially indistinguishable, I see no way to avoid arriving at the same conclusion." *Id.* at 876.

3. Parties sought en banc rehearing in *Cole*, *Reese III*, and *Kelsey-Hayes*, but the court denied rehearing in each. Four judges wrote separately in connection with the order denying rehearing in *Kelsey-Hayes*, and those opinions further demonstrate how deeply and irreparably divided the circuit is with regard to vesting principles.

Judge Sutton, concurring in the denial, recognized that "[b]y nearly every measure, this case deserves en banc review," for "[d]istinct perspectives on the lifetime vesting of healthcare benefits in time-limited collective bargaining agreements led us to release three opinions on the same day that face in different directions." *UAW v. Kelsey-Hayes Co.*, 872 F.3d 388, 389 (6th Cir. 2017). "[S]ome of those decisions are inconsistent with [*Tackett*]," he continued, "and some of them contrast with the approach our sister circuits have taken on the same issue." *Id.* at 390. But the Sixth Circuit is in no position to resolve this intra-circuit split, he explained. "With 16 judges on the en banc court, there is a real possibility that we would not have nine votes for any one of" the courts' multiple "approaches" to vesting. *Ibid.*

Judge Griffin, joined by Judge Gilman, would have granted en banc review. Like Judge Sutton, these judges acknowledged that the Sixth Circuit's vesting "decisions are in irreconcilable conflict regarding how

courts are to view durational clauses," and circuit "law is one of contradiction and confusion in an area of the law that demands consistency and clarity." *Id.* at 391-392. Quite simply, "[o]ur post-*Tackett* case law is a mess," for "*Gallo*, *Cole*, *Reese*, and *Kelsey-Hayes* cannot all be correct." *Id.* at 390, 392. Judge Gibbons, by contrast—who wrote the majority opinions in *Kelsey-Hayes* and *Reese III*—thought en banc review was unnecessary because "factual differences between the cases determined the outcomes." *Id.* at 388.

The Sixth Circuit is irreconcilably divided over a question of *law*—whether a contract's general durational clause controls absent a stated intention in the contract to vest retiree healthcare benefits for life. See also *Serafino* v. *City of Hamtramck*, 2017 WL 3833206, at *6-8 (6th Cir. Sept. 1, 2017) (relying on general durational clauses to hold that retiree healthcare benefits had not vested). Indeed, Judge Gibbons' statement that each of the Sixth Circuit's vesting cases turns on its facts betrays the court's conflicting *legal* positions. The rule of law applied in *Gallo* and *Cole* does not assign any weight to the "factual differences" to which Judge Gibbons refers. Rather, it follows the predictable, straightforward rule that, "[w]hen a specific provision of the CBA does not include an end date, we refer to the general durational clause to determine that provision's termination." *Gallo*, 813 F.3d at 269.

In short, the Sixth Circuit has and will remain the preferred venue for unions and retirees seeking to infer a right to lifetime healthcare benefits from CBAs that are silent on the subject. That court is hopelessly divided internally over the issue, and squarely at odds with other courts of appeals that apply *Tackett*.

III. This Case Presents An Issue Of Exceptional Importance.

1. The legal standard *Reese III* applied creates unpredictability, complexity, and enormous cost by abandoning *Tackett*'s reliance on written plan documents and established principles of contract interpretation.

It is a "core" requirement of ERISA that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995) (quoting 29 U.S.C. §1102(a)(1)). Accordingly, "the rule that contractual 'provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA [welfare benefits] plan.'" *Tackett*, 135 S.Ct. at 933 (alterations in original). This "'focus on the written terms of the plan is the linchpin of' ERISA, for it ensures that the '"system * * * is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [welfare benefits] plans in the first place."' *Ibid.* (alterations in original). By "assuring a predictable set of liabilities," ERISA aims to "induc[e] employers to offer benefits." *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010).

Reese III topples this incentive structure. CBAs conferring retiree healthcare benefits necessarily use prospective language to describe benefits, and the reasoning of the panel below would permit courts to find ambiguity and resort to extrinsic evidence in most cases. "Predictability as to the extent of future obligations would be lost." *Moore* v. *Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988).

Massive and protracted litigation inevitably will follow, adding to "a tsunami of retiree medical

litigation" that already "has crashed over the dockets of our nation's federal courts," imposing severe burdens on employers and the judicial system. http://www.jonesday.com/retiree-medical-litigations-dirty-little-secret-location-location-location-08-04-2009 (cataloging plaintiffs' rush to the Sixth Circuit under *Yard-Man*).

Unions and retirees who failed to obtain a written right to vested benefits through collective bargaining could come to court years or even decades later, claiming that hand-picked selections from a vast universe of extrinsic evidence implied a right to lifetime coverage. Using such evidence to impose an extraordinary financial obligation on the employer—one that the unions and employees could not obtain through collective bargaining—runs afoul of federal labor laws, which prohibit end-runs around the bargaining process. See *Chi. & N.W. Ry. Co.* v. *United Transp. Union*, 402 U.S. 570, 581-583 (1971) (describing purpose of Norris-LaGuardia Act).

Worse, such litigation is unpredictable. This case illustrates the point. Without any express promise of lifetime healthcare benefits—and in the teeth of a general durational clause and reservation-of-rights language—the panel inferred a right to lifetime coverage. It based this finding on just two strands of extrinsic evidence, 854 F.3d at 883, neither of which suggests that CNH intended to commit itself to lifetime benefits. See *id.* at 892-893 (Sutton, J., dissenting).

Litigation under the *Reese III* approach, involving years' or even decades' worth of extrinsic evidence, is also extraordinarily time-consuming and expensive and imposes severe burdens on federal district courts. CNH has been litigating *Reese* for *13 years*. The case is now on its third appeal and headed back for additional

proceedings on remand. Meanwhile, Whirlpool's vesting litigation in the Northern District of Ohio has taken six years to reach judgment, following a series of conflicting interim decisions, with appellate review and potentially more litigation to come.

Such protracted, costly litigation, culminating in unpredictable results based on selections from a "mountain of extrinsic evidence," *Kelsey-Hayes*, 854 F.3d at 869, eviscerates the incentives that ERISA aims to create. It produces "substantial disincentives for even offering [benefit] plans," *Moore*, 856 F.2d at 492, accelerating the already pronounced erosion of these programs nationally. See Tricia Neuman & Anthony Damico, *Fading Fast: Fewer Seniors Have Retiree Health Insurance* (May 15, 2016) (43% drop in large employers offering retiree health coverage since 1988), https://www.kff.org/medicare/issue-brief/fading-fast-fewer-seniors-have-retiree-health-insurance.

2. *Reese III* undercuts ERISA's effort to afford employers special flexibility in providing healthcare benefits. Unlike pensions, which vest automatically, employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Tackett*, 135 S.Ct. at 933.

This flexibility serves important federal policies. "[M]edical insurance must take account of inflation, changes in medical practice and technology, and increases in the costs of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs." *Moore*, 856 F.2d at 492. It is no surprise, therefore, that most people—including those covered by Medicare and Medicaid—are subject to changes to their health plans and premiums. See, *e.g.*, *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 582-583 (2012) (describing

Congress' need to change terms of federal medical benefit programs). Likewise, in ERISA, "Congress recognized that 'requir[ing] the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans.'" *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997); see also *Moore*, 856 F.2d at 492 ("Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables"). "Giving employers this flexibility also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour." *Ibid.*

By locking employers into high-cost, inefficient retiree medical plans that have fallen out of step with the nation's health delivery system, *Reese III* hobbles employers. Midwest manufacturers with employees in the Sixth Circuit, already under heavy pressure to remain competitive, have been forced to take on additional, massive liabilities. See *UAW* v. *Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007) (acknowledging that vested medical benefits threatened GM's "financial position").

Massive unfunded healthcare benefits are out of tune with changes in the provision of healthcare. Rising medical costs have driven large employers into bankruptcy.[2] Bankruptcy wipes out benefits and

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[2] *E.g.*, *Now for the Reckoning*, THE ECONOMIST (Oct. 13, 2005) (Delphi bankruptcy driven by pension and welfare benefit costs), http://www.economist.com/node/5017138#print; Steve Miller, *Full Text of Remarks by Delphi's Steve Miller*, FINANCIAL TIMES (Oct. 10, 2005), https://www.ft.com/content/72f2db2c-39a5-11da-806e-00000e2511c8 (GM had $80 billion "of accrued retiree health care obligations" and was financially unable to wait until current labor contracts expired to reduce this obligation). See also Alan

eliminates jobs.[3] And funding legacy welfare benefits diverts investment from new plants and requires severe cost-cutting measures. Ultimately, therefore, employees and retirees bear the burden. See Phillip Moderson, *Following a Dangerous Precedent: The California Rule and the Kansas Pension Crisis*, 64 U. KAN. L. REV. 1113, 1116 (2016) (a permissive vesting rule "harms the state employees the rule seeks to protect"). To remain viable, large employers threatened by judicially vested healthcare obligations will need to shrink the size of their work force, offer fewer or no healthcare benefits, or both. So "while [particular] plaintiffs" may be "helped by a decision in their favor," such a ruling would "decrease protection for future employees and retirees." *Moore*, 856 F.2d at 492.

Local governments too face crushing retiree healthcare costs that they need to reduce to stay solvent and be able to continue to provide services to residents.[4] A recent Michigan Task Force report prepared at the request of Governor Snyder documented that some 330 Michigan municipalities and counties have $10 billion in unfunded retiree healthcare benefit obligations, only $3 billion in assets to cover that liability, and an annual shortfall in contributions of $300 million which

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Reuther, *By Saving Billions in Retiree Health & Pension Benefits, Auto Bailouts Were an Even Bigger Success Than Acknowledged*, Economic Policy Institute (Mar. 12, 2015), http://www.epi.org/blog/by-saving-billions-in-retiree-health-and-pension-benefits-auto-bailouts-were-an-even-bigger-success-than-acknowledged.

[3] Delphi, for example, had to "cut thousands of workers" before emerging from bankruptcy. Chris Isidore, *Delphi Actions Could Bankrupt GM*, CNNMoney.com (Mar. 31, 2006), http://money.cnn.com/2006/03/31/news/companies/delhi/.

[4] *E.g.*, *Flint Manager Warns of Bankruptcy Over Retiree Costs*, Bloomberg News (July 17, 2014), http://www.crainsdetroit.com/print/593941.

means these unfunded obligations continue to grow. *Responsible Retirement Reform for Local Government Task Force, Report of Findings and Recommendations for Action* 8, 12 (July 2017), http://www.michigan.gov/documents/snyder/R3_Task_Force_Report_579101_7.pdf. Those figures do not include the $6 billion in unfunded retiree healthcare benefits that Detroit eliminated through bankruptcy. *Id.* at 12 n.7.

Michigan local governments' already difficult struggle to restructure these liabilities is compounded by the Sixth Circuit's decisions imposing lifetime obligations that were never promised. See, *e.g.*, *Kendzierski* v. *Macomb Cty.*, 901 N.W.2d 111 (Mich. Ct. App. 2017) (finding "ambiguous" CBA vested County retirees with unmodifiable lifetime healthcare benefits; striking down changes that had saved County $26 million); *Harper Woods Retirees Ass'n* v. *City of Harper Woods*, 879 N.W.2d 897 (Mich. Ct. App. 2015) (reversing summary judgment for City on retiree healthcare vesting claims challenging increase in co-pays, deductibles, and prescription costs).

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Reese III conflicts squarely with this Court's decision in *Tackett* and deepens inter- and intra-circuit splits that encourage forum shopping. It threatens severe adverse consequences for employers and employees alike.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted.

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